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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-766

DONALD WALLACE, *et al.*,

Petitioners,

v.

MICHAEL KERN, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Stephen M. Latimer
579 Cortlandt Avenue
Bronx, New York 10451

Melvin L. Wulf
American Civil Liberties Union
Foundation, Inc.
22 East 40th Street
New York, New York 10016

Daniel L. Alterman
James Reif
Robert M. Boehm
% Center for Constitutional Rights
853 Broadway
New York, New York 10003

Alvin J. Bronstein
Nancy C. Crisman
National Prison Project
American Civil Liberties
Union Foundation
1346 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Petitioners

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners Donald Wallace, *et al.*, acting on behalf of themselves and all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 8, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 499 F.2d 1345 and appears in the Appendix, *infra*, p. 1a. The opinion of the United States District Court is reported at 371 F. Supp. 1384 and appears in the Appendix, *infra*, p. 13a. The order of the United States District Court is unreported and appears in the Appendix, *infra*, p. 18a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 8, 1974. A timely petition for rehearing *en banc* was denied on August 21, 1974. Time to file this petition for certiorari was extended by this Court until December 19, 1974, and petition was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. Do federal courts have the power, pursuant to 42 U.S.C. §1983, to grant relief for unconstitutional delays in criminal trials where the right to speedy trial is asserted prospectively by a class?

STATUTORY PROVISIONS INVOLVED

New York Criminal Procedure Law provides in pertinent part as follows:

> CPL §30.30 speedy trial; time limitations
>
> 1. . . . a motion . . . must be granted where the people are not ready for trial within:
>
> (a) six months of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony;
>
> * * * * *
>
> 2. . . . where a defendant has been committed to the custody of the sheriff in a criminal action he must be released on bail or on his own recognizance, . . ., if the people are not ready

for trial in that criminal action within:

> (a) ninety days from the commencement of his committment to the custody of the sheriff in a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a felony;

* * * * *

Federal Rule of Civil Procedure 23(b)(2) provides as follows:

> ". . . the party opposing the class has acted or refused to act on grounds generally applicable to the class. . . ."

42 U.S.C. §1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI – Jury Trial for Crimes and Procedural Rights.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . . .

AMENDMENT XIV – Citizenship; Privileges and Immunities; Due Process. . . .

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In July, 1972, seven indigent pre-trial detainees incarcerated in the Brooklyn House of Detention for Men filed this action on behalf of themselves and all other detainees confined pending trial in the Supreme Court of the State of New York on their respective indictments for the alleged commission of felonies. The amended complaint sought declaratory and injunctive relief for systematic and widespread deprivation of constitutional rights. These included, *inter alia*, denial of the effective assistance of counsel, restrictions on access to the courts, failure to provide a speedy trial, coercion in obtaining guilty pleas, denial of reasonable bail and deprivation of due process and equal protection of the laws.

A motion to dismiss the complaint was denied by the District Court (Orrin G. Judd, J.) on February 27, 1973, and reported at 369 F. Supp. 180 (E.D.N.Y. 1973).[1]

---

[1] The District Court found that it had jurisdiction to hear all of the claims raised in the complaint, including the issue raised in this petition, under 28 U.S.C. §1343 and 42 U.S.C. §1983.

After extensive hearings, on May 10, 1973, the District Court found severe constitutional infirmities in the manner in which the Legal Aid Society performs its constitutionally mandated function, and granted petitioners' motion for preliminary relief. The Court of Appeals reversed, holding that the Legal Aid Society does not act under color of State law. *Wallace v. Kern*, 481 F.2d 621 (2d Cir. 1973), *cert. den.*, 414 U.S. 1135 (1974).

Subsequently, the District Court held hearings on the lengthy trial delays suffered by incarcerated persons in Kings County. The situation revealed, and the length of delay commonly suffered, are aptly summarized by the Court of Appeals, 499 F.2d at 1349:

> As of July 1973, there were over 700 persons named in indictments in the Kings County Supreme Court who had been in custody awaiting disposition of their cases for more than six months, 210 of whom had been in custody for more than a year. Lengthy pretrial confinement continued to be the rule in Kings County, despite the reform measures outlined by Justice Damiani. . . . By January, 1974, there were still 398 inmates awaiting trial who had suffered more than six months' confinement. The time lapse from the date of arrest to the date of trial in run-of-the-mill cases had been as long as 27 months. Such delays contribute to overcrowding at the House of Detention, a facility with a rated capacity of 810 inmates, but which housed an average of 1,391 inmates during 1973, and an average of 995 inmates during January 1974. (App., *infra*, p. 6a)

After the hearings, Judge Judd concluded that "[o]ver-long confinement without trial is a denial of constitutional rights." 371 F. Supp. at 1389. (App., *infra*, p. 28a.) This holding was grounded both in the Due Process Clause and in the Sixth Amendment guarantee of "a speedy and public trial," with the court noting that "speedy" may have a different meaning for an incarcerated person than for one who is free while his case is pending.

Judge Judd's decision relied heavily on the prejudice to jailed defendants from excessive pre-trial incarceration, though the Court of Appeals erroneously stated that the lower court did not consider this factor. 499 F.2d at 1350. Both Dr. Sheldon Cholst, a psychiatrist who was employed at the Brooklyn House of Detention, and Professor Bernard L. Segal testified that pre-trial detention is physically and psychologically oppressive, and invariably increases the accused's anxiety and concern, two factors considered significant by this Court in *Barker v. Wingo*, 407 U.S. 514, 532 (1972). Professor Segal further testified that the defense is necessarily impaired because the prisoner is often unable to assist counsel in preparation of a defense and that he may forego his constitutional rights in his anxiety to have the case concluded.

The District Court found that delays inherent in the Kings County judicial system, rather than the actions of accused persons, are responsible for the delays. The record amply supports this finding. The major cause of delay is the fact that the Kings County Supreme Court's resources are inadequate to cope with a large backlog of cases, despite an influx of money into the system. In 1972, only 341 out of 12,000 indictments were tried. The percentage of cases tried did not increase substantially in 1973, although the number of indictments decreased.

Also contributing to the delay is the misuse of the state's "ready rule", CPL §30.30, whereby a case need only be declared "ready" by the prosecution within the desired time period to toll the State's statutory prompt trial obligation. Further causes include inadequate record-keeping and the District Attorney's practice of calling cases for trial out of chronological order.

Compounding the constitutional violation is the failure of the state courts to provide adequate remedies when members of petitioners' class assert their rights. The District Court found that in 1972, when the Legal Aid Society brought speedy trial motions in the state appellate court in behalf of 400 of the more than 600 of its clients in jail more than six months, some bails were reduced, but in more than half the cases no trial dates were fixed. Undaunted by their lack of success, the Society brought four test cases to the New York Court of Appeals, hoping for a ruling on the problem of widespread trial delays. *People ex rel. Franklin v. Warden*, 31 N.Y.2d 498, 341 N.Y.S.2d 604, 294 N.E.2d 199 (1973). That court, rather than considering the problem of routine and chronic delay or otherwise reaching the constitutional issue, granted trial preferences for the four petitioners, a remedy which is meaningless when the deprivation affects an entire class.

Based upon its findings that conditions in the Kings County Suspreme Court violate the standards enunciated in *Barker v. Wingo, supra,* and the Due Process Clause, the District Court, on March 26, 1974, directed that for all persons who have indictments pending in Kings County, except for murder cases, and who have been incarcerated pending trial for more than six months, trial shall commence within forty-five days of submission of a written request for trial, or the indictee be released on his own recognizance. A murder indictee may submit a written

request for trial after he has been incarcerated for nine months. (App., *infra*, p. 13a.)

A motion for a stay of the order was denied by the District Court on March 29, 1974, except that a stay of the notice provision was granted pending application to the Court of Appeals for a stay of the entire order. On April 2, 1974, the Court of Appeals stayed the District Court's order and directed that the appeal be expedited. A judgment was entered on July 8, 1974, reversing and vacating the District Court order. The Court of Appeals held that a federal court may not give prospective class relief from unconstitutional delays in criminal trials and that speedy trial violations "must be determined ad hoc on a case-by-case basis." 499 F.2d at 1351. A petition for rehearing *en banc* was timely filed and denied on August 21, 1974.

An application for extension of time to file this petition was timely filed and granted on October 22, 1974.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS ERRED IN HOLDING THAT *BARKER V. WINGO* BARS A CLASS ACTION BY PRE-TRIAL DETAINEES SUFFERING FROM EXCESSIVE PERIODS OF PRE-TRIAL DETENTION.

In *Barker v. Wingo*, *supra*, this Court held that the denial of a speedy trial is to be determined by an ad hoc balancing test based on the circumstances of each case and involving four factors: length of the delay, reasons for the delay, defendant's assertion of his right, and prejudice to the defendant resulting from the delay. 407 U.S. at 530. The Court of Appeals in this case held that the

District Court ". . . failed to account for the four *Barker* factors, and it ignored the mandate to proceed on a case-by-case basis." 499 F.2d 1345.

This holding misapplies the *Barker* standard because it takes no account of the prospective nature of petitioners' claim and the relief sought. In *Barker*, the issue was whether, at the time of trial, the right to a speedy trial had been denied. The remedy sought was dismissal of the charges, the only possible remedy for the completed violation of the right. *Strunk v. United States*, 412 U.S. 434, 439-440 (1973). In that posture, strict case-by-case inquiry is required due to the severity of the remedy, and because the major harm to be evaluated in that context, *i.e.*, impairment of the defense, may vary greatly from case to case.

But the right to a speedy trial is here asserted prospectively, in order to protect the interests served by that right. The relief sought is trial rather than dismissal; and one purpose of the District Court's order was preservation of the defense so that a fair trial would be possible.

The other interests served by the Sixth Amendment guarantee include preventing undue and oppressive incarceration as well as minimizing the anxiety and prejudice resulting from public accusation. *Smith v. Hooey*, 393 U.S. 374, 378 (1969); *United States v. Ewell*, 383 U.S. 116, 120 (1966). Prospective relief is mandated to avoid such consequences, for they can never be adequately remedied in post-conviction proceedings or by dismissal at trial. The right to a speedy trial is unique in that it may be irretrievably lost by the mere passage of time.

For this reason it is a present and continuing right which may be asserted before trial in order to prevent its completed violation. A criminal defendant may enforce the

". . . affirmative constitutional obligation to bring [an accused] promptly to trial," as well as obtain a dismissal of charges after the State's failure to do so. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490-491 (1973); see also *Smith v. Hooey*, *supra*, at 383; *Klopfer v. North Carolina*, 386 U.S. 213, 219-222 (1967).

Furthermore, the impingement on interests protected by the Sixth Amendment right is due to systemic causes and the injuries suffered are classwide. The need for strict case-by-case inquiry is not controlling where ". . . the party opposing the class has acted or refused to act on grounds generally applicable to the class. . . ." F.R. Civ. P. 23(b)(2). Moreover, as the District Court noted, "[t]he oppressive character of prolonged incarceration does not differ vitally among different defendants, and therefore is particularly appropriate for relief in a class action." 371 F. Supp. 1391.

The District Court order, contrary to the Court of Appeals' view, did not quantify the right to a speedy trial into a fixed time period, as would an order requiring dismissal of indictments after six and nine months; nor did it establish a new constitutional rule. Instead, it imposed an equitable remedy intended to prevent irreparable loss of liberty and certain prejudice to the Sixth Amendment rights of many class members. While there is no constitutional right to be tried within six months, a federal district court may use that period as the basis for equitable relief designed to protect plaintiffs' rights. This distinction was recognized by this Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), holding that a mathematical ratio may be used as the basis for an equitable remedy for school segregation, even though there is no substantive constitutional right to any particular degree of racial balance. The Court of Appeals' failure to

appreciate this distinction between right and remedy amounts to a failure to understand the nature and purpose of the order below. Properly understood, the six and nine month periods of the order must be evaluated as an exercise of equitable discretion as to remedy, and the proper standard of review is whether the lower court abused its discretion. On the record below, particularly as to the effects of pretrial incarceration on the detainee, 371 F. Supp. at 1388, the relief granted is conservative and cannot be considered an abuse of discretion.

II.

THE EXCESSIVE PERIODS OF PRETRIAL INCARCERATION SUFFERED BY PETITIONERS DEPRIVE THEM OF DUE PROCESS OF LAW.

Petitioners, though unconvicted and presumptively innocent, routinely suffer terms of incarceration ranging up to 27 months. 499 F.2d at 1349. They are kept in jail due to their poverty and consequent inability to post bail. The District Court held that "over-long confinement without being convicted, simply for being poor, is also a denial of due process of law." 371 F. Supp. 1389. The Court of Appeals did not comment on petitioners' due process claim in its opinion, although the issue was briefed and argued.

When government restricts a constitutional right, it must do so in the least drastic way available. *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shelton v. Tucker*, 364 U.S. 479 (1960). Where the right involved is the most fundamental of all, freedom from actual imprisonment, governmental infringements must be kept within the narrowest bounds. Cf. *United States v. Thompson*, 452 F.2d 1333 (D.C. Cir., 1971), *cert. denied*, 405 U.S. 998 (1972).

The only constitutionally acceptable reason for detaining an unconvicted defendant is to assure his presence at trial, cf. *Stack v. Boyle*, 343 U.S. 1, 5 (1951); it follows that any restriction on pretrial detainees must be limited to what is necessary to accomplish that purpose. *Rhem v. Malcolm*, __F.2d __, (No. 74-2072) (2nd Cir., Nov. 8, 1974); *Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal., 1972).

Thus, the lower courts have held that jail conditions that are unnecessarily restrictive and oppressive deny pretrial detainees due process of law. *Rhem v. Malcolm, supra; Inmates of Suffolk County Jail v. Eisenstadt*, 494 F.2d 1196 (1st Cir. 1974); *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972); *Inmates of Milwaukee County Jail v. Petersen*, 353 F. Supp. 1157 (D. Wis., 1973). Inadequate resources or administrative convenience will not excuse such conditions. *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark., 1971); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va., 1971). The loss of liberty itself is surely of more concern than the incidents of detention; if needlessly stringent jail conditions violate due process, needlessly long pretrial incarceration is *a fortiori* unconstitutional.[2] The State's failure to provide prompt trials for detained persons inflicts such excessive pretrial incarceration.

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[2] Compare also *Baldwin v. New York*, 399 U.S. 66 (1970), holding that imprisonment of six months or more *after conviction* may not be imposed without the opportunity for a trial by jury. Surely *pretrial* incarceration routinely exceeding that length of time, imposed due to an accused's inability to post bail, violates the Constitution.

The State did not and cannot assert any defensible reason for its failure to provide prompt trials and thus to alleviate the burden of pretrial punishment. In light of the harsh and drastic effects of extended pretrial detention, as shown by the record and accepted by the District Court, the relief granted was appropriate and necessary to safeguard petitioners' right to due process of law.

III.

THIS CASE RAISES CRUCIAL QUESTIONS ABOUT THE REALIZATION OF THE RIGHTS TO SPEEDY TRIAL AND DUE PROCESS FOR INDIGENT CRIMINAL DEFENDANTS IN AN URBAN JUDICIAL SYSTEM. IF THE DISTRICT COURT CANNOT FASHION PROSPECTIVE RELIEF TO PREVENT THE WHOLESALE DENIAL OF SIXTH AND FOURTEENTH AMENDMENT RIGHTS, PETITIONERS WILL BE LEFT WITHOUT A MEANINGFUL REMEDY.

This Court must clarify and reassert the present right to a speedy trial if poor people are to obtain some measure of justice in the State's criminal courts.[3] The Court of Appeals' relegation of petitioners to individual remedies in fact deprives them of any remedy at all. The fundamental nature of the speedy trial guarantee has been repeatedly recognized by this Court; a decision that respects it in form while nullifying it in fact cannot be permitted to stand.

---

[3] The enormous importance of this issue is illustrated by the fact that Congress is presently considering speedy trial legislation which would require that the trial of defendants in federal criminal cases be commenced within ninety (90) days of arrest and sixty (60) days after indictment. The Senate Bill (S. 754) was reported on favorably by the Senate Committee on the Judiciary on July 18, 1974. That bill and H.R. 17409 (filed October 16, 1974) are presently being considered by The House Committee on the Judiciary.

From the defendant's point of view, the speedy trial guarantee serves "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker v. Wingo, supra,* at 532. This Court has recognized that the major evils to be avoided are not associated with the eventual conduct of an accused's trial. *United States v. Marion,* 404 U.S. 307, 320 (1971). Rather, they are the opprobrium of public accusation, uncertainty of consequences, disruption of job and family.

The detrimental impact of excessive trial delay is magnified many times by incarceration. This Court noted in *Barker v. Wingo, supra,* at 532, that "The time spent in jail is simply dead time." The record below shows that it is more than "dead": it is actively destructive to the incarcerated defendant. The undisputed evidence, accepted by the District Court and not questioned by the Court of Appeals, showed that the pretrial detainee suffers not only loss of liberty but also loss of employment and destruction of family relationships. The accused person suffers extreme and excessive anxiety and concern, and becomes increasingly bitter and alienated as he is forgotten by the world outside. The suicide rate in jail is twenty-five times higher than that of the general population and tranquilizers are used extensively. The overcrowding and lack of rehabilitative, recreational or adequate medical programs exacerbate these extreme deprivations.

Moreover, the likelihood of ultimate impairment of the defense is greatly increased by long periods of pretrial detention. This Court has acknowledged that "if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo, supra,* at 532-33. In addition, his ability to

communicate with his attorney is severely impaired by the difficulty of visiting clients in jail, and the result is a complete loss of confidence in his lawyer and of faith in the criminal justice system. According to the uncontroverted evidence accepted by the District Court, the pressures of prolonged incarceration ultimately result in inducement to accept a guilty plea. The right to a fair trial – or any trial at all – is violated by the facts of this case.

Societal interests as well as defendants' rights are compromised by excessive pretrial delay, as this Court acknowledged in *Barker v. Wingo, supra,* at 519-520. Excessive delay between arrest and the imposition of sentence may hinder the rehabilitation of the guilty, especially where, in effect, substantial punishment *precedes* conviction. Such pretrial punishment is an unconscionable burden on the innocent, whether they insist on a trial or plead guilty under the pressures and uncertainty of pretrial detention. The ultimate victim is respect for law and the system which administers it.

Delay contributes to the overcrowding of local jails, whose inmates are commonly afforded harsher treatment than sentenced prisoners, as the District Court observed. 371 F. Supp. at 1389; see also *Rhem v. Malcolm supra.* The jails themselves are destructive of character and of prospects for rehabilitation, and terribly expensive as well. Excessive pretrial detention also prevents the detainee from working and leads both to the loss of his productivity and to hardship and probable welfare dependency for his family.

The Court of Appeals has twice acknowledged the serious and long-standing character of the problem of trial delay in Kings County. *Thorne v. Warden,* 479 F.2d 297 (2d Cir. 1973); *United States ex rel. Frizer v. McMann,* 437

F.2d 1312 (2d Cir., *en banc*, 1971). In the case at bar it stated:

> "We have noted more than once in the past that funding, facilities and personnel in Kings County are chronically inadequate to the task of bringing criminal cases promptly to trial. . . . Lengthy pretrial confinement continues to be the rule in Kings County. . . .' 499 F.2d at 1349.

Yet in the face of this continuing crisis, the Court of Appeals' decision holds that the right to a speedy trial may be vindicated only after its completed denial in an individual case.

Under this analysis, judicial prevention of the irreparable and classwide injuries suffered by petitioners' class is impossible. There are no other remedies. Petitioners' inability to protect their right to a speedy trial is discussed and documented extensively by the District Court. 371 F. Supp. at 1389-90. Post-conviction remedies are futile to rectify the injuries caused by excessive pretrial incarceration. Individual motions are almost invariably futile, and even if successful result only in a trial preference, which only delays the trials of other members of the class. The Legal Aid Society's attempt to obtain speedy trials by filing hundreds of individual petitions resulted in a speedy trial for no one. *People ex rel. Franklin v. Warden, supra.* Class relief in the state courts is foreclosed by New York law. *Bellamy v. Judges*, 41 App. Div. 2d 196 (1st Dept.), *aff'd.*, 32 N.Y.2d 886 (1973).

An approach that does not recognize the systemic nature of the problem and formulate relief on that basis is an exercise in futility. The only legal remedy which can

protect petitioners' rights to speedy trials and due process is one which can be asserted prior to trial to prevent the violation. Thus, the District Court's order was both appropriate and necessary under the circumstances. Moreover, as a matter of policy, the relief granted by the District Court is far superior to assertion of the right as a defense, since it is preventive in nature and does not cause indictments to be dismissed without regard to guilt or innocence.

Federal habeas corpus is no substitute. The burden placed on the federal courts by post-conviction proceedings is already notorious. It is highly unrealistic to believe that the District Court could deal with all the colorably meritorious petitions that could be filed by members of petitioners' class, even if their overburdened assigned counsel could prepare and prosecute them.

It is no answer to say that federal courts "have no supervisory authority over state courts and have no power to establish rules of practice for the state courts." 499 F.2d at 1351.

Federal courts have no supervisory authority over state schools, prisons, welfare systems, police departments, or any other state institutions; but they have the power and the duty to protect constitutional rights when state agencies of any sort infringe upon them. It would be preferable for the states on their own to desegregate their schools, operate their prisons humanely, and avoid improper discrimination in their welfare systems; but when they do not, the victims of their unconstitutional practices are entitled to a federal court remedy under the Civil Rights Act.

The same principle governs the unconstitutional practices of state court systems. *Pugh v. Rainwater*, 483 F.2d 778 (5th Cir. 1973), *cert. granted, sub nom. Gerstein v. Pugh*,

94 S. Ct. 595 (1973) (class action against denial of preliminary hearings); *Conover v. Montemuro*, 477 F.2d 1073 (3rd Cir. 1973) (*en banc*) (class action against family court intake procedures); *Long v. Robinson*, 436 F.2d 1116 (4th Cir. 1971) (class action against discriminatory classification of certain youthful offenders); *Penn v. Eubanks*, 360 F. Supp. 699 (M.D. Ala., 1973) (class action against discriminatory jury selections); *Gilliard v. Carson*, 348 F. Supp. 757 (M.D. Fla., 1972); *Green v. City of Tampa*, 335 F. Supp. 293 (M.D. Fla., 1971); *Bramlett v. Paterson*, 307 F. Supp. 1311 (M.D. Fla., 1969) (class actions against denial of counsel to indigents). Any deference due the state on the particular issue of this case has been obviated by the state's default in solving the problem.

The State's tolerance of present conditions amounts to an assessment that the system in Kings County is operating constitutionally. The Court of Appeals' view of *Barker v. Wingo, supra*, precludes any relief that would preserve the rights asserted by petitioners. The drastic and irreparable effects of lengthy incarceration without a determination of guilt are broadly felt by indigent defendants in overcrowded urban judicial systems. For these reasons, it is crucial to the preservation of Sixth and Fourteenth Amendment rights that this Court review a Court of Appeals decision that is intolerable as a matter of policy as well as wrong as a matter of law.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

Stephen M. Latimer
579 Cortlandt Avenue
Bronx, New York 10451

Melvin L. Wulf
American Civil Liberties
Union Foundation, Inc.
22 East 40th Street
New York, New York 10016

Daniel L. Alterman
James Reif
Robert M. Boehm
% Center for Constitutional
Rights
853 Broadway
New York, New York 10003

Alvin J. Bronstein
Nancy C. Crisman
National Prison Project
American Civil Liberties Union
Foundation, Inc.
1346 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Petitioners

APPENDIX 1

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 1074 **September Term, 1973**

(Argued April 25, 1974 Decided July 8, 1974)

Docket No. 74-1434

Donald Wallace, *et al.*,
Plaintiffs-Appellees,

v.

Michael Kern, *et al.*,
Defendants-Appellants.

Before: Lumbard and Hays, Circuit Judges;
Jameson, District Judge.*

Appeal from an order of the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge*, granting appellees' motion for preliminary injunction and ordering that inmates in the Brooklyn House of Detention for Men under indictment in the Kings County Supreme Court be permitted to demand trial after six-months pretrial incarceration (nine months

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*Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

in the case of inmates accused of murder) and be released on their own recognizance if not brought to trial within 45 days of their demand.

Reversed and vacated.

Hillel Hoffman, Assistant Attorney General of the State of New York, New York, (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, on the brief, Joel Lewittes, Assistant Attorney General, of counsel), *for defendants-appellants.*

Stephen M. Latimer, New York, New York, Daniel L. Alterman, Center for Constitutional Rights, New York, New York (James Reif, National Lawyers Guild, New York, New York, Alvin Bronstein, Nancy Crisman, National Prison Project, Washington, D.C., Robert Boehm, William M. Kunstler, Center for Constitutional Rights, New York, New York, on the brief), *for plaintiffs-appellees.*

Pierce Gerety, Jr., New York, New York (Robert Kasanof, William Gallagher, New York, New York, on the brief), *for Legal Aid Society, as Amicus Curiae.*

Robert Plotkin, Washington, D.C., on the brief, *for the National Legal Aid and Defender Association as Amicus Curiae.*

Hays, *Circuit Judge:*

In July 1972 a committee of inmates awaiting trial or sentencing in the Brooklyn House of Detention for Men brought a class action pro se in the District Court for the Eastern District of New York. The defendants were six individual Justices of the New York Supreme Court, all of whom presided in criminal cases in Brooklyn. The Plaintiffs alleged that the district court had jurisdiction under 28 U.S.C. §1343 (1970). In substance, they prayed for interlocutory and permanent relief under Section I of the Civil Rights Act of 1871, 42 U.S.C. §1983 (1970), restraining the defendant Justices from violating inmate rights guaranteed by the federal Constitution.[1]

A week after the action was commenced, Judge Weinstein dismissed all claims relating to errors in the cases of individual prisoners on the authority of *Younger v. Harris,* 401 U.S. 37 (1971), and all claims relating to individual Justices as matters more appropriately resolved by local political processes. Nonetheless, he found that the complaint stated a core of facts going to the prompt and fair disposition of criminal cases in Brooklyn, and going to the condition and treatment of inmates in the House of Detention. He subsequently appointed counsel of the inmates' choosing to aid in presenting their side of the difficult jurisdictional and substantive issues presented by the case.

The prisoners by their appointed counsel filed an amended complaint in October 1972, and a second amended complaint in January 1973. Judge Weinstein disqualified himself, and the case was assigned to Judge Judd. The second amended complaint stated the same eight claims for relief as in the first amended complaint and also alleged cruel and unusual punishment by reason of lengthy pre-trial delays, and denial of equal protection because the plaintiffs were indigent. All Justices of the Kings County Supreme Court and various other court and city officials were joined as defendants.[2] Judge Judd denied the defendants' subsequent Rule 12(b)(6) motion to dismiss, except that he dismissed the claims relating to defendants other than the Supreme Court Justices.

In February 1973 the district court held a hearing on the plaintiffs' motion for preliminary injunction, taking evidence on the claims relating to pro se applications, Legal Aid Society representation, and pretrial delay. See note 2, supra. In March 1973 the court granted class status to the plaintiffs.[3]

On May 10, 1973, the district court granted the plaintiffs' motion for preliminary injunction as to two of their claims, restraining the Clerk of the Kings County Supreme Court from refusing to place pro se applications on the court's calendar, and restraining the Legal Aid Society from accepting more than forty cases per lawyer, reserving decision as to the other six claims. The Legal Aid Society and the Justices of the Supreme Court appealed to this court, and on June 27, we reversed and vacated the district court's order:

> "In the case involving the Legal Aid Society we hold that the court has no jurisdiction under Section 1983 since the Society was not

> acting under color of state law. With relation to the order directed at the court personnel we hold that under the principle known as comity a federal district court has no power to intervene in the internal procedures of the state courts." *Wallace v. Kern*, 481 F.2d 621, 622 (2d Cir. 1973) (per curiam), cert. denied, 42 U.S.L.W. 3387 (Jan. 7, 1974) (citation omitted).

On July 20 and July 25, 1973, the district court held additional hearings on the plaintiffs' motion for preliminary injunction as to the speedy trial claim. A number of witnesses testified for the prisoners, including three of the prisoners and a psychiatrist at the House of Detention,[4] and Justice Vincent Damiani testified for the defendant Justices.[5] The district court granted the inmates' motion for a preliminary injunction, ironically, almost eight months after the hearing. It ordered that each prisoner detained while awaiting trial in the Kings County Supreme Court for more than six months (or more than nine months in the case of one accused of murder) be allowed to demand a trial, and be entitled to release on his own recognizance if not brought to trial within 45 days of his demand. The order provided that delays caused by the inmate would not toll the initial six or nine month period, but that such delays would toll the 45 days period following the demand for trial. The order further provided that notice of its contents should be posted in the various institutions holding persons awaiting trial in Kings County, and be distributed to each new prisoner upon his arraignment in the Kings County Supreme Court.

The Justices appealed. On April 2, 1974, we granted a stay of the preliminary injunction pending appeal.

We reverse and vacate the district court order.

I.

We have noted more than once in the past that funding, facilities and personnel in Kings County are chronically inadequate to the task of bringing criminal cases promptly to trial. *Wallace v. Kern*, supra; *Thorne v. Warden*, 479 F.2d 297, 299 n. 2 (2d Cir. 1973); see *United States ex rel. Frizer v. McMann*, 437 F.2d 1312, 1314-15 (2d Cir.) (en banc), cert. denied, 402 U.S. 1010 (1971). As of July 1973 there were over 700 persons named in indictments in the Kings County Supreme Court who had been in custody awaiting disposition of their cases for more than six months, 210 of whom had been in custody for more than a year. Lengthy pre-trial confinement continues to be the rule in Kings County, despite the reform measures outlined by Justice Damiani. See note 5, supra. By January 1974 there were still 398 inmates awaiting trial who had suffered more than six month's confinement. The time lapse from the date of arrest to the date of trial in run-of-the-mill cases has been as long as 27 months. Such delays contribute to overcrowding at the House of Detention, a facility with a rated capacity of 840 inmates, but which housed an average of 1,391 inmates during 1973, and an average of 995 inmates during January 1974.

Although we are "entirely sympathetic with the purposes which the district judge sought to accomplish by his order," *Wallace v. Kern*, supra, 481 F.2d at 622, we must reverse and vacate that order.

II.

The Supreme Court's most recent statement on the Sixth Amendment's guarantee of a speedy trial, and indeed its first

attempt to set out a definitive approach to speedy trial claims, is *Barker v. Wingo*, 407 U.S. 514 (1972). There the Court rejected the notion that the Sixth Amendment may be confined to a rigid set of rules. It held that as a matter of constitutional law the speedy trial right cannot be quantified into any specific period of time; that the Sixth Amendment does not require the state to bring a criminal defendant to trial within any specific time period.

In *Barker* the Court recognized the amorphous quality of the right to a speedy trial as well as its relative nature and its dependence on the circumstances of each case. Accordingly, the Court adopted an ad hoc balancing test under which the conduct of the prosecution is weighed against the conduct of the defense. In the course of balancing these relative circumstances, a court must consider four factors: the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant resulting from the delay. 407 U.S. at 530.

In the present case the district court gave lip service to the *Barker* methodology and criteria, but in fact it failed to account for the four *Barker* factors, and it ignored the mandate to proceed on a case-by-case basis.

As to the first factor, the length of the delay, the district court made no finding of fact and pointed to no rule of law to support its use of the curiously arbitrary six and nine month periods. *Barker* expressly rejects the notion that the Sixth Amendment can be quantified into a specific time period. The court must examine each particular delay, treating it as a "triggering mechanism." When and if there is a showing of "presumptively prejudicial delay," the court must extend its inquiry to a consideration

of the other three factors. The length of delay that will provoke such inquiry "is necessarily dependent upon the peculiar circumstances of the case." 407 U.S. at 530-31. For example, a delay that would be presumptively prejudicial in the case of a defendant accused of a simple street crime might be tolerable in the case of a defendant accused of participating in a serious and complex conspiracy. 407 U.S. at 531. The presumptively prejudicial period may be shorter in a case depending on the recollection of eyewitnesses than in a case depending on less perishable forms of evidence. See 407 U.S. at 531 n. 31. When it established its six month period, the district court failed to consider such unique factors as doubtless exist in the cases of individual pretrial detainees. It attacked the problem of calendar congestion in the Kings County Supreme Court with a blunt instrument. It fixed a uniform period of presumptively prejudicial delay, rather than undertake the fine, albeit difficult, case-by-case determination of whether a prejudicial delay exists as to any individual inmate.

The second of the *Barker* factors is "the reason the government assigns to justify the delay." 407 U.S. at 531. The district court in the present case did not inquire into the reason for delay specific to any given prisoner. It found only that the overcrowded criminal docket of the Kings County Supreme Court was the most frequent reason for trial delay. While it is clear that such overcrowding weighs against the state "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant," 407 U.S. at 531, this factor alone is not a sufficient reason to impose a uniform six month speedy trial rule. The district court was required to balance the deplorable condition of court congestion against other factors present in the various individual cases.

As to the third *Barker* factor, whether the defendant has asserted his right, the district court's order requires the state to bring an accused to trial only after he has made a demand. In this regard, the order embodies the demand waiver rule which was repudiated by the Supreme Court in *Barker*. Under the district court order, a defendant who does not demand a trial can be tried at the state's dilatory convenience and will not be entitled to relief, regardless of how unreasonable the pretrial delay may be.

Finally, and perhaps crucially, the district court did not consider whether an individual defendant's period of pretrial confinement prejudices any of the three purposes of the Sixth Amendment: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." 407 U.S. at 532; *United States v. Ewell*, 383 U.S. 116, 120 (1966); *Smith v. Hooey*, 393 U.S. 374, 377-78 (1969). It reasoned that since under its order it did not dismiss the indictments of defendants not tried within 45 days of their demand, it need not consider whether the defense would be impaired. This line of reasoning is no substitute for the ad hoc balancing mandated by *Barker*. It is clear that prejudice to the defense goes to whether the Sixth Amendment right to speedy trial has been abridged, not to the type of remedy available to a defendant. For example, absent a specific showing of prejudice to the defense, a relatively long period of delay may be excused. In *Barker* the defendant was denied relief after a five-day delay, in part because his defense was not prejudiced by the delay.

This is not the proper business of the federal courts, which have no supervisory authority over the state courts and have no power to establish rules of practice for the

state courts. Rather, the federal courts must limit their inquiry to the specific facts regarding a complaining petitioner. Relief from unconstitutional delays in criminal trials is not available in wholesale lots. Whether an individual has been denied his right to a speedy trial must be determined ad hoc on a case-by-case basis.

FOOTNOTES

[1] The prisoners claimed, in effect, that Kings County bail procedures denied them equal protection of the law, that the Supreme Court's refusal to entertain pro se applications denied them due process of law, that lengthy pretrial and pre-sentencing delays evidenced a denial of their right to speedy trial, and that practices in identifying suspects and in obtaining indictments were contrary to state law.

[2] The second amended complaint alleged the following claims for relief:

1) that the case loads of Legal Aid Society attorneys were so great as to deny indigent inmates the effective assistance of counsel;
2) that excessive prosecutorial delay in presenting cases to the grand jury, excessive delay in bringing cases to trial, and excessive delay in preparing pre-sentence reports denied inmates their right to speedy trial;
3) that the King's County Supreme Court consistently set excessive bail;
4) that lengthy periods of pretrial incarceration deprived the inmates of liberty without due process of law;
5) that the court's practice of refusing to accept pro se applications from inmates who have been assigned Legal Aid counsel denied them due process of law;
6) that the Corrections Department's alleged practice of unnecessarily shuttling inmates between the House of Detention and the court house was designed to intimidate the inmates and induce them to plead guilty;

7) that various practices in the Supreme Court had the effect of intimidating inmates into pleading guilty rather than stand trial; and
8) that the above practices discriminated against indigents on account of their inability to make bail.

Of these claims for relief, only the second is involved in this appeal, and that only to the extent that it alleges pretrial delay.

[3] In granting class status, the district court established two subclasses: all detainees in the House of Detention under indictment, and all detainees not under indictment.

[4] The testimony of Barry Wilson was typical of the three inmates who testified. He stated that he had not come to trial after nearly eleven months of post-arrest incarceration. Bernard L. Segal, an attorney and a professor at Golden Gate University, testified that pretrial delay generally damages the prisoner in five ways: it denies a constitutional right, it prejudices the prisoner's economic and social interests, it has such adverse psychological effects as inducing anxiety, irritation and bitterness, it impairs the inmate's ability to aid his counsel in preparing his case, and it coerces the prisoner to accept less than the full measure of constitutional rights. Dr. Sheldon Cholst, a psychiatrist with the prison Health Service of the House of Detention, testified that lengthy pretrial delays of uncertain duration cause anxiety, uncertainty and resentfulness, and contribute to the fact that the suicide rate among inmates is 25 times higher than that of the general population. Samuel Dawson, Associate Attorney in Charge of the Brooklyn Supreme Court Office of the Legal Aid Society, testified that in a number of Criminal Parts, the most recent cases tried were not the oldest cases on the calendar. He said that the expansion of the Legal Aid Trial Parts had not resulted in speedier trials, and he predicted that the total number of trials in 1973 would be less than the total in 1972.

[5] Justice Damiani testified as to the steps taken by the Brooklyn Supreme Court to reduce its criminal backlog. The number of Trial Parts was increased by one-third. The court established Conference Parts to eliminate cases in which defendants are willing to plead guilty and instituted a digital system to eliminate fragmented representation by the Legal Aid Society. Judges have been assigned to

the House of Detention to conduct bail conferences, conferences which may be initiated by a defendant by writing an informal letter to the court. The Legal Aid Society caseload has been reduced to the limits set by Judge Judd's May 10 order, even though that order was vacated on appeal.

Donald Wallace
et al., v.
Michael Kern et al.

I concur

J.E.L.
July 2, 1974

Donald Wallace
et al., v.
Michael Kern, et al.

I concur

W.J.J.
6/21/74

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT, NEW YORK

DONALD WALLACE, *et al.*, *Plaintiffs,*	:	
—against—	:	**72-C-898**
MICHAEL KERN, *et al.*, *Defendants.*	:	

ORDER

Plaintiffs having moved for a preliminary injunction to protect their right to a speedy trial; and the Court having heard the testimony offered by plaintiffs and defendants on July 20, 1973, and July 25, 1973; and the Court having considered the affidavits and other documentary proof submitted by the respective parties; and due deliberation having been had; and the Court having filed its written memorandum of decision dated March 7, 1974;

NOW, on the motion of Stephen H. Latimer and Daniel L. Alterman, attorneys for plaintiffs, it is ORDERED that the defendant justices of the Kings County Supreme Court and the Kings County District Attorney shall comply with the following provisions:

1. In the case of all persons who have indictments, other than for murder, pending in the Kings County Supreme

Court and who have been held for six calendar months or more in any institution under the care, custody, and control of the New York City Department of Correction or in the Ossining Correctional Facility, or in any other institution designated by the appropriate authority to house Kings County pretrial indictees, trial shall commence within forty-five days after submission of a written request for trial, *pro se* or by counsel, to the clerk of the Criminal Term of the Kings County Supreme Court, with a copy sent to the District Attorney.

In the case of all persons who have indictments for murder pending in the Kings County Supreme Court and who have been held for nine calendar months or more in any institution under the care, custody, and control of the New York City Department of Correction or in the Ossining Correctional Facility, or in any other institution designated by the appropriate authority to house Kings County pretrial indictees, trial shall commence within forty-five days after submission of a written request for trial, *pro se* or by counsel, to the clerk of the Criminal Term of the Kings County Supreme Court, with a copy sent to the District Attorney.

Request and motions for a speedy trial submitted prior to March 7, 1974, shall not be considered "written requests" for purposes of this Order. This Order shall apply to all persons presently under indictment, and to all indicted persons subsequent to March 7, 1974.

2. The trial of all those indictees who were and continue to be incarcerated for more than six or nine months as of March 7, 1974 shall commence in the manner directed in paragraph 1 in accordance with the following schedule:

Length of Incarceration	*45 Day Period Begins to Run*
(for all indictees)	
1 year	from March 7, 1974
9 months to 1 year	45 days from March 7, 1974 (April 21, 1974)
(for all non-murder indictees)	
6 months to 9 months	90 days from March 7, 1974 (June 5, 1974)

3. In the case of any incarcerated indictee who has submitted a request for trial in accordance with paragraphs 1 and 2, and whose trial has not commenced by the forty-fifth day, plus any periods excluded by the terms of this Order, the clerk of the Criminal Term shall forthwith notify the Department of Correction in writing of that fact and the defendant Department of Correction shall forthwith release the indictee from custody.

4. If, after submitting a request for trial, an indictee or his counsel requests an adjournment, the forty-five day period shall be tolled during the period of the adjournment only, but not for a period longer than the length of the adjournment requested by the indictee. In no event shall a request for an adjournment be considered a waiver of any of the other provisions of this Order. No adjournment on motion of the District Attorney or the court, without the indictee's in-court oral or written consent, shall toll the 45 day period, unless the indictee refuses to appear in court after being directed to do so.

5. Any waiver of any provision of this Order or any consent to an adjournment must be made by the indictee on the record in open court, or by written consent of the indictee. If the indictee is not present in court, nor has given his written consent, no provision of this Order may be waived by counsel, and no adjournment granted shall

toll the 45 day period. No defendant in this action shall, under any circumstances, require any person to waive any provision of this Order or to consent to any adjournment. Any delay caused by failure of the defendant Department of Corrections to produce the accused in court will not toll the 45 day period.

6. Notice of the provisions of this Order in the form annexed ("The Notice") shall be posted in every day room in each housing floor in the Brooklyn, Queens, Adolescent, Adult and Women's Houses on Rikers Island, Houses of Detention.

7. The notice shall be posted in a public place on every floor in every other institution which houses persons awaiting trial on indictments in Kings County Supreme Court. Only floors which house Kings County indictees shall be required to post said notice.

8. A copy of the notice shall be mailed by the clerk of the Criminal Term to every person under indictment in Kings County who is presently incarcerated in any institution other than those specified in paragraph 6.

9. The clerk of the Criminal Term shall give a copy of the notice to every person indicted in Kings County on the date of his arraignment on the indictment, if such person is remanded to an institution under the care, custody. and control of the defendant Department of Correction. Delivery of a copy of the notice to the person's attorney shall not be deemed sufficient.

10. Nothing in this Order shall be deemed to contradict the terms of any detainer or warrant lodged against the person submitting a request for trial.

11. If a person has more than one indictment pending in the Kings County Supreme Court the period of incarceration shall be deemed to run from the date of arrest of the earliest indictment, unless the later indictment(s) are for murder or for a crime allegedly committed while in custody. Any order granting release on recognizance which may be entered in compliance with the terms of this Order shall apply to all indictments pending against the individual.

12. Members of plaintiffs' staff shall be permitted to inspect the public areas and/or day rooms of any institution which houses Kings County indictees at any time during business hours, after reasonable notice to the wardens of said institutions, for the purpose of inspecting the placement of the notice.

13. There shall be excluded in counting the 45 day period after written request for a speedy trial, the period or periods of the pendency of other proceedings concerning the defendant such as those set forth in section 30.30 (a)(4) of the Criminal Procedure Law of the state of New York.

/s/ Orrin G. Judd
U.S.D.J.

March 26, 1974
Brooklyn, New York

APPENDIX 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

* * * * *

Appearances:

STEPHEN M. LATIMER, ESQ.

DANIEL L. ALTERMAN, ESQ.
JAMES REIF, ESQ.
ROBERT L. BOEHM, ESQ.
WILLIAM M. KUNSTLER, ESQ.
Center for Constitutional Rights

ALVIN J. BRONSTEIN, ESQ.
NANCY CHRISMAN, ESQ.
National Prison Project

Attorneys for Plaintiffs

HON. LOUIS J. LEFKOWITZ
Attorney General, State of New York
Attorney for State Defendants

BY: HILLEL HOFFMAN, ESQ.
Assistant Attorney General
Of Counsel

HON. NORMAN REDLICH
Corporation Counsel, City of New York
Attorney for City Defendants

BY: JOHN P. NACHAZEL, ESQ.
JEFFREY FRIEDMAN, ESQ.
Assistant Corporation Counsel
Of Counsel

MARY D. PICKMAN, ESQ.
Counsel for N.Y.C. Board of Correction
Amicus curiae

ROBERT HERMAN, ESQ.
Attorney for Legal Aid Society
Amicus curiae

JUDD, J.

MEMORANDUM OF DECISION

Plaintiffs in this class action have moved for a preliminary injunction to assure their right to a speedy trial or to release from custody.

Facts

The action is brought on behalf of all felony defendants confined at Brooklyn House of Detention for Men (BHD) pending indictment, trial or sentence. Among numerous rights which the action seeks to enforce is the constitutional right to a speedy trial for persons held in custody because of their inability to provide money bail. The second amended complaint asks for the dismissal of charges or the release on their own recognizance of all criminal defendants who have not been tried within six months after their commitment.

The problem of trial delays in Kings County Supreme Court is one of long standing. Trial delays in the metropolitan counties were described in 1971 as "notorious" and "chronic," in an opinion by the Second Circuit Court of Appeals. *United States ex rel. Frizer v. McMann*, 437 F.2d 1312, 1315. The same court noted in 1973 that serious delays continued. *United States ex rel. Thorne v.*

Warden, Brooklyn House of Detention for Men, _____ F.2d _____, May 16, 1973. The New York Legislature early in 1972 (L. 1972, c. 496, §1) enacted a finding that "there is an emergency of grave dimensions in the processing of felony charge cases in the criminal courts in the metropolitan counties of the state." The legislature appropriated $6,700,000 to be used, with federal and local funds, for an emergency felony case processing program.

In December 1972, there were 644 defendants who had been confined in BHD for more than six months. During the first three months of 1973, the Legal Aid Society obtained twelve acquittals of defendants who had been in jail for periods ranging from twelve to fourteen months. Four BHD inmates who testified in this court in April 1973, had been confined from thirteen to seventeen months awaiting trial.

On July 9, 1973, there were 707 persons named in indictments in Kings County Supreme Court who had been in custody for more than six months, and 210 of these had been in custody for more than a year. This represented almost 44 percent of the total 1,614 defendants in custody. Some of these were awaiting sentence, but the vast majority were awaiting trial.

A witness in *Valvano v. Malcolm*, 70-C-1390, testified in January 1974 that he had just been acquitted on a murder charge after being in jail in BHD for fourteen months. An affidavit for plaintiffs listed details concerning six inmates who had been held from eight to twenty months awaiting trial, in spite of an aggregate of fourteen speedy trial motions.

Trial delays are reflected in overcrowding of both BHD and QHD. Although the rated capacity of BHD is 840, it housed an average of 1,391 during 1973, or over 160 percent of capacity. Because of the overcrowding at BHD, there were 200 pretrial detainees on Kings County indictments housed in Queens House of Detention for Men (QHD), which was at 131 percent of capacity on July 9, 1973. Although both institutions were designed to hold one inmate in each cell, there was still double occupancy in almost all cells in QHD in January 1974 when the Warden testified before this court in the *Valvano* case. The occupancy of BHD had been reduced to 995 or about 125 percent of capacity by January 1974, but there was still double occupancy of a large proportion of the cells. The cells are approximately five feet by eight feet in dimensions.

The New York City Board of Correction in its *amicus curiae* brief cites a number of cases involving detainees, which serve to highlight the impact of lengthy pretrial confinement.

After being held in jail for twenty-two months, "W" pleaded guilty on June 13, 1973 to a robbery charge. He has been released on $250 bail, with the expectation that he would be placed on probation. His case had been marked marked ready and passed fifty-five times. While in jail, he was severely beaten by other inmates, and sustained a shoulder injury, from which he still suffers.

"M" was in jail for nineteen months before pleading guilty on June 14, 1973 to a robbery charge, at a time when he claimed to have lost contact with witnesses who might have aided him.

"Harold S." was in jail for twenty-one months and had attempted suicide during a period of despondency, before he finally pleaded guilty on June 29, 1973 to manslaughter.

"Herbert S." was in jail for sixteen months before pleading guilty on May 9, 1973 to third degree robbery. Only after his plea was he transferred to Rikers Island, where he received hospital treatment for swollen glands from which he had suffered for over six months.

"D" was in jail for eighteen months before obtaining a Wade hearing, which was followed by a guilty plea to a reduced robbery charge on June 19, 1973. In spite of his plea, he still maintains his innocence.

State Court Remedies

Efforts at relief in the state courts have been largely unsuccessful. Under the leadership of Chief Judge Fuld, the Administrative Board of the Judicial Conference on May 3, 1971 adopted a speedy trial rule, which would have required release after ninety days in custody without a trial, except in homicide cases. 22 NYCRR 29.1-29.7. This rule was not to become effective until May 1, 1972. Before then the legislature enacted its own plan, requiring only that the people be ready for trial within ninety days, the legislature stating that its enactment "shall be deemed to supersede any rule of the Administrative Board of the Judicial Conference." CPL §30.30, as amended by L. 1972, Chap. 184, effective April 28, 1972.

Following the enactment of Section 30.30, the Legal Aid Society attempted to secure the release of detainees in custody more than six months. William Gallagher, Director of Court Operations for the Legal Aid Society, testified that in the summer of 1972 the Society brought

400 speedy trial motions before the Appellate Division, Second Department, that the Acting Presiding Justice directed a conference with the District Attorney concerning bail, that a Supreme Court Justice released 202 defendants on their own recognizance or low cash bail, but denied the other motions, and that no trial dates were set for the other defendants.

After being unsuccessful in the Appellate Division, the Legal Aid Society took four test cases to the New York Court of Appeals, which on February 16, 1973 directed that the cases be granted a trial preference to assure the commencement of trial within three months thereafter. *People ex rel. Franklin v. Warden*, 31 N.Y.2d 498, 341 N.Y.S.2d 604. The Court said (31 N.Y.2d at 502-04, 341 N.Y.S.2d at 607-08):

> We recognize that the four cases now before us are typical of the vast pretrial felony backlogs in the County of Kings and perhaps to a lesser degree in other metropolitan counties.
>
> It may be urged that the disposition we make in the cases now before us is unfair to other detainees similarly situated in Kings County. We would only note that it does not appear that all or any of such other detainees actually desire to go to trial . . . The ultimate remedy must be provision by the appropriate branches of government of the material and personal resources required to handle a court burden increased and increasing. . . .

The obstacles to obtaining a speedy trial are aggravated by various practices in Kings County Supreme Court. (1) The District Attorney can pick any one of the first forty cases on the calendar in a part to bring to trial, while a defense counsel cannot be adequately prepared on more than a few cases at a time. While the Deputy Chief of the Supreme Court Bureau in the District Attorney's office testified that Legal Aid receives notice from forty-eight hours to a week before a case is brought to trial, the court finds that his directions to this effect are not generally followed. (2) Compensation to private attorneys assigned under Article 18-B of the County Law is still limited by statute to $15.00 an hour for court time and $10.00 an hour for out-of-court time; but even this amount is usually cut. They are thus discouraged from making speedy trial motions. The Administrator of the Indigent panel for the Second and Eleventh Judicial Districts testified that attorneys almost never receive the dollar amount requested on an hourly basis. (3) There is no provision for supervision of 18-B attorneys by any experienced attorney.

It may be noted, however, that the burden on the Legal Aid Society staff has been reduced since this court's order of May 10, 1973. Administrative Justice Vincent D. Damiani of the Criminal part, Kings County, testified on July 25, 1973 that Legal Aid was not being assigned new cases until the suggested standard of not more than forty felony cases per lawyer was met.

Under existing calendar practice, as described by Samuel Dawson, Associate Attorney in charge of the Supreme Court office of Legal Aid Society in Kings County, the fact that a case is marked ready and passed does not necessarily mean that the District Attorney is ready, but

is simply a formal method of compliance with the readiness rule.

"The system isn't working," according to Peter Purvis, Deputy Director of Operations for the Legal Aid Society. Everything is being done which the facilities permit, but defendants still are not being tried promptly.

Effects of Prolonged Pretrial Detention

Prolonged detention creates various types of harm for defendants. One problem is the inducement to plead guilty rather than wait for trial, as mentioned by Mr. Justice Thomas R. Jones in his testimony. Professor Bernard Segal of Golden Gate University testified that prolonged pretrial incarceration involves (1) loss of an irretrievable right to freedom, (2) lack of compensation for lost time if found innocent, (3) excessive anxiety and concern, (4) substantial impairment to the right of counsel, with a tendency to rely on other inmates as lawyers' visits become less frequent and less constructive, (5) personal hardship resulting from the inability to keep a job open and the strain on family relationships, and (6) coercion to accept a guilty plea rather than to claim a defendant's full constitutional rights or even to assert believable defenses. He pointed out that deterioration of a detainee accelerates materially after three months, with family visits becoming less frequent. Dr. Sheldon Cholst, a psychiatrist with the Prison Health Service at BHD, testified that prolonged pretrial confinement creates tremendous anxiety, a tendency to become hardened and embittered, a suicide rate 25 times as high as the general population, and twice as many breakdowns as the general population. There is no way of earning money at BHD, no cigarettes are supplied to people without funds, and there is pressure to enter

homosexual situations in order to obtain small amounts of money. According to Dr. Cholst, the psychological situation of state prisoners who know the length of their sentences is much better than that of detainees who are uncertain of the time or consequences of trial. The testimony of Professor Segal and Dr. Cholst was not effectively impeached or contradicted, and is accepted by the court as true.

Improvements to Date

The court has given full consideration to the fact that more than six months have elapsed since the close of the hearings. The necessary deliberation and preparation of this decision have been unduly delayed by an accumulation of other urgent motions and cases and by an almost continuous series of trials. The continuance of the problem is indicated by a number of facts, including the testimony received during January and February 1974 in two class actions involving inmates both at BHD and QHD. *Jenkins v. Malcolm,* 73-C-261; *Valvano v. Malcolm, supra.* Some of this testimony has already been mentioned.

The flow of speedy trial habeas corpus petitions to this court from Kings County defendants has continued during late 1973 and early 1974. The fact that they were filed *pro se*, by inmates who have counsel, appears to reflect a belief by counsel that state courts do not provide an effective remedy. The writer's share of such petitions has included at least four where pretrial confinement ranged from twelve to seventeen months, four others where the total period in custody has not been checked, and one which challenged a guilty plea as having been coerced by pretrial delay.

In fact, during the time this memorandum was being drafted, the District Attorney's office had just begun the trial of a defendant in custody since December 1972, whose trial after fourteen months was precipitated by an order of this court dated January 30, 1974 directing his release on his own recognizance unless his trial began before March 1, 1974. *United States ex rel. Jerome Perry v. Warden, Brooklyn House of Detention* (73-C-1666).

The number of criminal parts was increased during 1973 so that there are now thirty-one parts in the criminal term, some of them operating on a twelve-month basis. During 1973, the number of indictments in Kings County also decreased, a fact which should give an ultimate potential of reducing trial delays. Monthly meetings are held on overcrowding and trial delay, attended by the Administrative Judge for the Criminal Part in Kings County, the Administrative Judge for the Supreme Court in Staten Island, the Chief Probation Officer and representatives of the District Attorney's office, Legal Aid Society, the Correction Department, and ancillary services.

A current comment on the Criminal Calendar in Kings County is contained in "From the Editor's Desk" in the March 1974 issue of the *Brooklyn Barrister* (Vol. 25, p. 99):

> The Criminal Term Parts have no calendar numbers and the District Attorney is responsible for selecting and moving cases for trial. The office of the District Attorney has been obliged to increase its staff but even so seems to be unable to promptly move cases for trial. Judges willing and anxious to try cases must still await the pleasure of the District Attorney.

When this court's Law Clerk assigned to this case visited the Supreme Court on March 4, 1974, he examined the ready calendar for four parts. In three of the four parts, more than 50 percent of the cases marked ready involved indictments filed in 1972 or earlier. The figure for the fourth part was 48 percent. In the four parts, there were 105 pre-1973 cases awaiting trial, only 67 cases involving 1973 indictments, and only 4 involving 1974 indictments. This is an improvement from the situation a year ago as noted in this court's memorandum of May 10, 1973 (p. 6), but it still falls far short of speedy trials. Of the calendars for 28 parts examined, only one had a 1973 case at the top of the list.

The Law Journal listings for criminal cases in Kings County do not give calendar numbers for criminal cases, as they did a year ago, although calendar numbers are listed for all civil cases.

Chief Judge Charles D. Breitel has initiated steps which may be ameliorative by designating, in cooperation with the four Appellate Divisions, an Administrative Judge for the entire state, and by obtaining the concurrence of the First and Second Department Appellate Divisions in designating Justice David Ross as City Administrative Judge. N.Y.L.J. February 28, 1974, p. 4. It is impossible, however, to predict how long it may take the new machinery to correct conditions which have existed for a considerable period of time in Kings County Supreme Court.

Discussion

Over-long confinement without trial is a denial of constitutional rights. The Sixth Amendment right to "a speedy and public trial" is now applicable to the states. *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988 (1967).

"Speedy" is a relative word, which may properly be interpreted differentiy for one who is confined in jail than for one who is at large. Since an unconvicted defendant in a detention facility actually enjoys fewer amenities than a convicted prisoner in a correctional institution, over-long confinement without being convicted, simply for being poor, is also a denial of due process of law. *Rhem v. Malcolm*, 70-C-3962 (S.D.N.Y. 1974); *Inmates of Suffolk Co. Jail v. Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973); *Inmates of Milwaukee Co. Jail v. Petersen*, 353 F. Supp. 1157 (E.D. Wis. 1973); *Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972).

Defendants assert that relief cannot be given in this action until each individual defendant has exhausted his state rights. However, this is not the sole test under 28 U.S.C. §2254. Subdivision (b) specifies:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process *or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.* (Emphasis supplied).

As pointed out above with respect to the *Franklin* case, a year's effort by the Legal Aid Society resulted in only four prisoners being granted trial preferences effective after more than nine months of confinement. *People ex rel. Franklin v. Warden*, 31 N.Y.2d 498, 341 N.Y.S.2d 604 (1973). State court remedies have not substantially reduced detention times.

This is a situation where the federal court may dispense with the process of "waiting for Godot." *St. Jules v. Beto*, 462 F.2d 1365, 1366 (5th Cir. 1972). Individual cases might obtain relief in the state courts, for the New York Court of Appeals has recognized that a person may not be subjected to "a greater deprivation of personal liberty than is necessary to achieve the purpose for which he is being confined." *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 350 N.Y.2d 889, 892 (1973). Individual action on behalf of hundreds of indigents has proved to be an ineffective remedy, however, in the state courts.

The hostility of New York State courts to class actions makes it impossible to obtain effective state relief where a large number of prisoners are suffering similar loss of rights. In *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 256 N.Y.S.2d 584 (1965), the Court of Appeals sustained the dismissal of a class action by Negro citizens of New York against labor unions in the construction industry in spite of

> . . . a grave and continuing breach by the defendant unions of the laws and declared policy of this state against the reprehensible practice of discrimination on racial grounds in the area of employment and employment opportunity.

15 N.Y.S.2d at 128, 256 N.Y.S.2d at 589. See also *Hall v. Coburn Corp.*, 26 N.Y.2d 396, 311 N.Y.S.2d 281 (1970).

On the basis of the *Gaynor* case, a suit challenging state facilities for the treatment of the mentally retarded in the Buffalo area was dismissed on the ground that it was not a proper class action, although Mr. Justice Walter J. Mahoney had found that the problems of the named plaintiffs were

not unique but were comparable to those of hundreds of others. *Usen v. Sipprell*, 71 Misc. 2d 633, 336 N.Y.S.2d 848 (Sup.Ct. Erie Co. 1972), *rev'd*, 41 A.D.2d 251, 342 N.Y.S.2d 599 (4th Dept. 1973).

Professor McLaughlin in his *Supplementary Practice Commentary* on NYCPLR §1005, McKinney's Vol. 7B, pp. 74, 76 (cumulative Annual Pocket Part), stated:

> The Court of Appeals' most recent contribution to the law of class actions leaves the darkess largely unobscured. . . .
>
> These cases highlight the chaotic and incomprehensible state into which class actions have fallen in this state.

Class actions are as much of a burden to the federal courts as they would be to the state courts, but, in the language of Judge Jack B. Weinstein of this court, addressing a symposium of the Judicial Conference of the Fifth Circuit on the alleged abusiveness of class actions, 58 F.R.D. 299, 305 (1973),

> Either we are committed to make reasonable efforts to provide a forum for the adjudication of disputes involving all our citizens . . . or we are not.

Defendants contend that the relief requested is barred by *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827 (1973). *Preiser*, however, merely held that the exhaustion requirement of 28 U.S.C. §2254(b) in a habeas corpus proceeding could not be avoided by labelling the proceeding as a civil rights action under 42 U.S.C. §1983. In the present case, however, the court has determined that, even if the case is properly cognizable only as a habeas

corpus action, the exhaustion requirements of Section 2254(b) have been met, to the extent of a showing that state remedies are ineffective.

Preliminary Injunction

In determining a plaintiff's right to a preliminary injunction, the court should consider the degree of likelihood of ultimate success on the merits, and the relative hardships to both parties. *Checker Motors Corp. v. Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir.), *cert. denied*, 394 U.S. 999, 89 S.Ct. 1595 (1969).

The facts, developed at hearings which have been so extensive that they almost constitute the basis for a final determination, show that ultimate success on the merits is likely. The irremediable hardship on plaintiffs from prolonged incarceration is evident. The risk to the defendants and the public from the release of a dangerous defendant or one who may abscond, can be avoided by providing appropriate procedures and personnel to bring him to trial promptly.

Normally, a preliminary injunction is used to preserve the *status quo*, but sometimes a mandatory injunction is necessary where, as then Circuit Judge Taft stated in *Toledo A.A. & N.M. Ry Co. v. Pennsylvania Co.*, 54 Fed. 730, 741 (C.C.N.D. Ohio 1893),

> . . . it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from.

The extent of amelioration of trial delays since the case began is not decisive on the right to a preliminary injunction. If the defendants in this case can show that the constitutional rights of pretrial detainees in Kings County are being protected when this case is ready for final decision on the merits, they may argue against the necessity of converting the preliminary injunction into a permanent one. This court should not delay, however, in enforcing the federal rights of such detainees at this time. The effect of the *Franklin* case on the question of abstention was treated in this court's memorandum of February 27, 1973 (p. 10), but what has already been said shows that this is not a proper case for abstention.

Dismissal of Indictments

Plaintiffs seek not only a prompt trial, but dismissal of indictments where a prompt trial is not granted. The latest rules on the constitutional requirement of a speedy trial were set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972). One of the four factors enumerated in *Barker v. Wingo* is prejudice to the defendant. The Court recognized three aspects of prejudice, namely, oppressive pretrial incarceration, anxiety and concern, and possible impairment of the defense, and stated that the last was the most serious. The right to release relates to the oppressive character of pretrail incarceration and to anxiety and concern. The right to dismissal relates to the impairment of the defense. The degree of impairment of defense varies with the circumstances, more than the other aspects of prejudice. The oppressive character of prolonged incarceration does not differ vitally among different defendants, and therefore is particularly appropriate for relief in a class action. Without saying that a federal class action for dismissal of old indictments cannot be sustained under

proper circumstances, it appears to the court that dismissal is not appropriate preliminary relief in this action.

Possible Exceptions to the Proposed Order

There may be instances where there is a special reason for permitting a defendant to be confined more than six months before trial; for example, if he is charged with murder for profit. On the settlement of the order the court will consider whether any exception from the requirement of speedy trial should be made, and if so whether this should be by general sub-classes, or should be left to individual determination, and whether a federal court should be concerned with individual exceptions.

The speedy trial rule proposed by the Administrative Board of the New York Judicial Conferences in 1971 contained several exceptions, but they related to a ninety day limit on custody. This memorandum proposes a limitation which is really seven and one-half months between arrest and trial. Exceptions from such a rule are less justifiable.

A period of time should be granted for the state to confirm its procedures with the speedy trial requirements now being announced by this court.

The court will grant a preliminary injunction directing that all defendants who have been held in custody for more than six months without trial be brought to trial within forty-five days after a written request or released on their own recognizance, but providing that the order shall apply immediately only to defendants who have been held in custody for a year or more; that it shall apply forty-five days after this date to defendants who shall have been held in custody for nine months or more; and

that it shall apply ninety days after this date to all defendants who shall have been held in custody for more than six months. No bond should be required as a condition (F.R.Civ.P. 65(c)) to the preliminary injunction.

Settle order on three days' notice.

/s/ Orrin G. Judd
U.S.D.J.

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-766

DONALD WALLACE, et al.,

Petitioners,

against

MICHAEL KERN, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3397

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

HILLEL HOFFMAN
Assistant Attorney General
of Counsel

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit which petitioners seek to review is reported at 499 F. 2d 1345, and is reproduced in petitioners' appendix at page 1a. The decision of the United States District Court for the Eastern District of New York which was reversed by the Court of Appeals, is reported at 371 F. Supp. 1384, and appears in petitioners' appendix at page 18a. The order of the District Court granting preliminary relief is not reported, and appears in petitioners' appendix at page 13a.

Jurisdiction

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The Court of Appeals decision was rendered on July 8, 1974. Petitioners' motion for rehearing *en banc* was denied by the Court of Appeals on August 21, 1974. This Court extended petitioners' time to apply for certiorari until December 19, 1974.

Question Presented

Whether the Court of Appeals properly held that the District Court had no power to establish a speedy trial rule for state pre-trial detainees, based solely on a fixed number of months that the detainees had been incarcerated prior to trial?

Statement of the Case

This action was commenced on June 30, 1972 by a group of pre-trial detainees in Kings County, New York, who alleged that their constitutional rights in pending criminal prosecutions had been violated by the conduct of six justices of the Kings County Supreme Court. On July 11, 1972 the District Court permitted the petitioners to proceed *in forma pauperis,* and on July 20, 1972, the District Court assigned counsel to represent petitioners. On August 1, 1972 the District Court directed petitioners to confine their allegations to patterns and practices of the state court, and not to the conduct of individual judges.

On October 16, 1972 petitioners filed their first amended complaint against all of the Justices of the Kings County Supreme Court. The complaint contained seven causes of action and alleged that petitioners were being subjected to lengthy delays before trial, excessive bail, ineffective assistance of assigned counsel, denial of opportunities to present

pro se motions to the state court, coerced guilty pleas and non-production in court by the correction department. On November 14, 1972 the respondent Justices of the state court moved to dismiss the complaint. Before this motion was heard the case was re-assigned to another district judge, and the petitioners filed a second amended complaint on January 29, 1973. This complaint contained eight causes of action and alleged, in addition to the allegations in the first amended complaint, that Kings County detainees were being subjected to cruel and unusual punishment and were being denied the equal protection of the law by reason of their lengthy incarceration prior to trial, due to their inability to post bail.

On February 2, 1973 the respondent Justices moved to dismiss the second amended complaint, and on February 13, 1973 the District Judge heard oral argument on the motion, at the Brooklyn House of Detention. The District Judge reserved decision on all aspects of the motion, except as to the portions of the complaint which complained of ineffective assistance of assigned counsel and the refusal of the state court to entertain pro se motions where a detainee was represented by an attorney. The District Judge ordered an immediate hearing on these issues, and testimony was taken on February 21 and 23, 1973. Shortly thereafter, on February 27, 1973, the District Court rendered a decision denying the motion to dismiss the remainder of the second amended complaint, and holding that it had jurisdiction under 42 U.S.C. § 1983 to entertain petitioners' claims about the criminal justice system in Kings County. On March 29, 1973 the District Court issued an order permitting petitioners to maintain the case as a class action.

On April 30, 1973 the District Court conducted a further evidentiary hearing on the control of the criminal calendar in the Kings County Supreme Court. This hearing was held in conjunction with the case of *McLaughlin* v. *Justices of the Supreme Court, Kings County,* a pro se civil rights

action that was similar to the instant case. On May 10, 1973 the District Court rendered a lengthy decision in both cases, granting a preliminary injunction in favor of petitioners on the issues of effective assistance of counsel and pro se motions. The District Court ordered the clerk of the Kings County Supreme Court to place all pro se petitions on the court's motion calendar, and ordered the Legal Aid Society to limit its caseload to forty cases per attorney.

This order was immediately appealed by the respondent Justices and by the Legal Aid Society to the Court of Appeals for the Second Circuit. On June 27, 1973 that Court ruled from the bench that the District Court had exceeded its jurisdiction under 42 U.S.C. § 1983 by granting relief against the Legal Aid Society, a private organization, and had exceeded its authority under the doctrine of comity by ordering the clerk of a state court to place motions on the court's calendar (481 F. 2d 621). On January 7, 1974 this Court denied certiorari (414 U.S. 1135).

On July 20 and 25, 1973 the District Court conducted evidentiary hearings on petitioners' cause of action relating to speedy trials. The District Court heard testimony from three detainees, a psychiatrist, a former Legal Aid supervisor and a criminal law expert. The District Court also heard testimony from the Assistant Administrative Judge of Kings County, on behalf of the respondent Justices. Essentially their testimony was as follows.

Bernard L. Segal, a defense lawyer and professor of law, testified that delays in bringing cases to trial resulted in five areas of prejudice to a criminal defendant: (1) denial of a constitutional right that can never be regained; (2) oppressively lengthy pre-trial incarceration; (3) anxiety and other psychological problems arising from uncertainty and delay; (4) deterioration of relationship with counsel; and (5) acceptance of less than full constitutional rights. Segal testified that lengthy pre-trial confinement inhibits an accused person's preparation of his case, causes him to

lose his job or seniority rights, impedes his relationship with his attorney and family, and causes him to plead guilty rather than wait for a trial. Mr. Segal suggested that detainees be released on their own recognizances if their cases were not tried within six months, and that defense attorneys be limited in their caseloads to twenty-five felony cases per lawyer.

Dr. Sheldon Cholst, a psychiatrist at the Brooklyn House of Detention, testified that lengthy pre-trial delays caused anxiety, uncertainty and resentfulness on the part of the inmates, and caused them to experience a higher than average rate of suicides and mental breakdowns. He said that this anxiety would be reduced if the inmates knew that their cases would be brought to trial within a definite period of time.

Samuel Dawson, a former Legal Aid supervising attorney, testified that in a number of the trial parts in Kings County, the cases that had been tried most recently were not the oldest cases on the court's calendar, although he did not know the reason why the newer cases were tried before the older cases. Dawson said that as a result of several hundred habeas corpus applications, the Legal Aid Society and the District Attorney had agreed on guilty pleas in more than two hundred cases, but that the remaining cases were not tried more quickly. He said that the expansion of trial parts that were manned by the Legal Aid Society had not resulted in speedier trials, and that the total number of trials in 1973 would probably be less than the total number in 1972.

Justice Vincent Damiani, the Assistant Administrative Judge in charge of the criminal parts of the Kings County Supreme Court, testified on behalf of the respondent Justices. He stated that the court had taken many steps to reduce its backlog of criminal cases, including the establishment of conference parts to screen out cases in which a defendant was willing to plead guilty, the institution of

a digital system based on a defendant's indictment number to insure that the defendant was continuously represented by the same Legal Aid attorney, the use of state probation officers to eliminate the backlog of cases awaiting probation reports, the assignment of judges to the Brooklyn House of Detention to handle arraignments, the assignment of a judge to the Brooklyn House of Detention in December, 1972 to handle bail conferences, the reduction of the Legal Aid Society's caseload to forty cases per lawyer, and the institution of a system whereby detainees were permitted to seek bail review by writing a letter to the court.

Justice Damiani further testified that the workload of the court had been reduced in 1973 due to a decrease in the number of pending cases and an increase in the number of criminal term parts. He said that during the first six months of 1973 the number of pending indictments had been reduced by 941 and the number of defendants awaiting trial had been reduced by 1,471. At the same time the number of criminal term parts had been increased from twenty in September, 1972 to thirty-one in September, 1973, including five narcotic parts. (The New York Law Journal of January 27, 1975 indicates calendars for thirty-eight criminal term parts in Kings County, including narcotics parts, conference parts and a motion part). Justice Damiani also testified that renovations had been completed on the third floor of the court house, which would increase the court's capacity to handle detainees.

On March 7, 1974, nearly eight months after the hearing on the speedy trial issue was concluded, the District Court rendered the decision which is the subject of the instant petition for certiorari. The District Court relied on the testimony of petitioners' experts concerning the harmful effects of pre-trial incarceration, and noted that there were cases in Kings County where detainees had been in jail for sixteen to twenty-two months before their cases were dis-

posed of by guilty pleas. The District Court concluded that state remedies to obtain a speedy trial were largely ineffective because the District Attorney could try cases out of chronological order, the New York courts were hostile to class actions, the New York Court of Appeals in a test case, *People ex rel. Franklin* v. *Warden*, 31 N Y 2d 498, 294 N.E. 2d 199 (1973), had granted preferences to only four defendants, and private attorneys were not adequately compensated or supervised by the state court. The District Court also relied on the testimony at hearings in two jail cases which were pending before the District Judge, but in which the respondent Justices were not parties, and relied on the observations of the District Judge's law clerk, who visited the Kings County Supreme Court on March 4, 1974. The Court noted that the overall situation had improved since May, 1973, but it still fell short of the requirement of speedy trials.

The District Court ruled that petitioners were entitled to a preliminary injunction, subject to a showing by the respondent Justices at trial that the injunction should not be made permanent. The District Court held that dismissal of indictments would not be a proper remedy, but that each detainee who had been in jail more than six months would be entitled to request a speedy trial, and to be released on his own recognizance if not brought to trial within forty-five days. The District Court set up a timetable whereby its order would apply immediately to any detainee who had been incarcerated more than one year, within forty-five days to any detainee who had been in custody more than nine months, and within ninety days to any detainee who had been in custody more than six months. (See petitioners' appendix #3, 18a-35a).

On March 7, 1974, the same day that the District Court filed its decision, the District Attorney of Kings County forwarded an updated report to the court, indicating further significant reductions in the caseload of the Kings County Supreme Court. The report showed that the num-

ber of pending indictments had been reduced by 41% since January, 1973, and that the number of defendants awaiting trial had been reduced by 47%. The report also showed that the number of incarcerated defendants had been reduced by 44% between January, 1973 and March 1, 1974, and that the number of detainees incarcerated more than six months had been reduced by 38%. On March 8, 1974 the District Court issued a supplemental memorandum, stating that the District Attorney's report showed substantial progress in reducing the backlog of criminal cases, but that the overall effect of the report was to confirm the District Court's decision.

On March 26, 1974 the District Court issued an order implementing the decision of March 7, 1974. The District Court directed that all detainees awaiting trial in Kings County for more than six months could make a written request to the clerk of the Kings County Supreme Court for a speedy trial. If the request was not acted upon within forty-five days, the clerk (not a judge) was directed to notify the New York City Correction Department to release the detainee from custody. The order specified that a nine month rule rather than a six month rule would apply to murder indictees, and that delays caused by any indictee would be chargeable to him only during the forty-five day period after a request for a speedy trial had been made, but not during the initial six months or nine months (See petitioners' appendix # 2, 13a-17a).

On March 29, 1974 the District Court granted a temporary stay of its order, and on April 2, 1974 the Court of Appeals granted a permanent stay and directed that the appeal be heard during the week of April 22, 1974. The Court of Appeals heard oral argument on April 25, 1974 and rendered a decision on July 8, 1974, reversing the decision of the lower court and vacating the lower court's judgment. The Court of Appeals held that the speedy trial order ran afoul of this Court's decision in *Barker* v.

Wingo, 407 U.S. 514 (1972), in a number of significant respects, and that the District Court had no authority to establish a rule of practice for the state court. The Court of Appeals stated that federal courts must limit their inquiry in speedy trial cases to the specific facts regarding a complaining petitioner, and that relief from unconstitutional delays was not available in wholesale lots.

Petitioners then moved in the Court of Appeals for rehearing *en banc,* and their motion was denied on August 21, 1974.

REASONS WHY CERTIORARI SHOULD BE DENIED

The Court of Appeals correctly reversed the decision and order of the District Court. The speedy trial rule that was fashioned by the District Court was contrary to the principles enunciated in *Barker* v. *Wingo,* and was an unwarranted intrusion into the operation of the State Court.

In *Barker* v. *Wingo,* 407 U.S. 514 (1972), this Court analyzed the interests that were involved in assaying a criminal defendant's constitutional right to a speedy trial, and formulated a balancing test in which the defendant's rights were weighed against the rights of the public and the difficulties in running a court system. In the instant case the District Court ignored the balancing test of *Barker* and formulated a speedy trial rule that violated the principles of *Barker* in three respects: first, the District Court established a fixed time limit for bringing cases to trial; secondly, the District Court granted relief to an entire class rather than on a case-by-case basis; thirdly, the District Court ruled that delays caused by an accused would be chargeable to him only after the six months or nine months period prior to a request for a speedy trial, but not before that time. To appreciate the gravity of these errors a brief examination of *Barker* is necessary.

In *Barker* this Court noted that the speedy trial right was generically different from the other constitutional rights for the protection of the criminally accused, because the societal interest in speedy trials was separate from and, at times, in opposition to, the interests of the accused; because deprivation of the speedy trial right may work to the accused's advantage; and because the right to a speedy trial was a more vague concept than other procedural rights (See 407 U.S. at 519-21). This Court noted that it would be tempting to adopt either of two rigid approaches to eliminate the uncertainty surrounding the speedy trial right, but it declined to do so. Instead it held that a rule based on a fixed period of time could be adopted by federal and state courts as a matter of internal procedure, but it was not required by the Constitution because the speedy trial right could not be quantified into a fixed number of days and months (See 407 U.S. at 523). This Court also rejected a demand-waiver rule, whereby the accused would have waived his speedy trial right during any period of time that he did not ask for a trial. This Court believed that such a rule was inappropriate because the accused had no obligation to bring himself to trial, and because defense counsel would be placed in a difficult position in requesting more time to prepare a case.

This Court established a balancing test to evaluate the competing interests that were involved in speedy trial cases. Such a test required an *ad hoc* approach rather than a broad approach, and rested on four critical factors: length of delay, reason for delay, the accused's assertion of his speedy trial right, and prejudice to the accused.

With respect to length of delay this Court said that until there was some delay which was presumptively prejudicial, there would be no need to inquire into the other factors of the balancing test. However, whether a delay was presumptively prejudicial depended on the facts and circumstances of each case, and not on a fixed period of time.

With respect to the reasons for the delay, this Court again rejected an inflexible rule, and held that different weights should be assigned to different reasons. Thus a deliberate attempt to delay a trial was to count more heavily against a prosecutor than delay caused by overcrowded courts or absent witnesses.

With respect to the accused's responsibility to assert his speedy trial right, this Court stated that a demand for a speedy trial was entitled to strong evidentiary weight, and that failure to assert the right would make it difficult for an accused to prove that he was denied a speedy trial. With regard to prejudice to the accused, this Court noted that there were three interests which the speedy trial right was designed to protect: prevention of oppressive pretrial incarceration; minimization of anxiety and concern; and limitation of impairment of an accused's defense by reason of delay. The third factor was considered the most critical because the inability of an accused to prepare his case undermines the fairness of the criminal justice system.

Finally, this Court reiterated its fundamental position that none of the four factors was either a necessary or sufficient condition to the finding of a deprivation of the speedy trial right, and that none of the four factors had "talismanic qualities". Rather the four factors were to be considered together with other circumstances as may be relevant, and the lower courts were required to engage in a "difficult and sensitive balancing process" (See 407 U.S. at 533).

In light of this clear elucidation in *Barker* v. *Wingo* of the many considerations that are involved in deciding speedy trial claims, it becomes manifest that the District Court's order in the instant case was properly reversed by the Court of Appeals. Rather than engage in the sensitive balancing process that was required by this Court, the District Court created a fixed rule based on a period of six months or nine months, regardless of the facts of indi-

vidual cases. Furthermore the District Court granted relief to an entire class of detainees rather than to individual detainees, thus decreasing the opportunity for review of speedy trial claims on an *ad hoc* basis. The District Court's order made no provision for consideration of the four factors enunciated in *Barker*, and provided that detainees would be released from custody on orders of the court clerk, rather than on orders from a state judge after a hearing on a speedy trial motion. The District Court's order was an obvious attempt to establish a rule of practice for the Kings County Supreme Court, in direct contravention of the admonition in *Barker* that this Court would not "establish procedural rules for the States, except when mandated by the Constitution" (407 U.S. at 523).

The District Court's order also violated *Barker* by failing to hold an accused responsible for delays caused by the accused during the initial six month or nine month period prior to a speedy trial request. In *Barker* this Court noted that by requiring the accused to assert his speedy trial right, a trial court may "attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection" (407 U.S. at 529). In the instant case the District Court's order failed to provide for a situation where the accused delays his case for the initial six or nine months period, and then requests a speedy trial when the proof has become stale or the witnesses harder to locate. In addition, as noted by the Court of Appeals, the District Court's order contains the demand-waiver rule that was rejected by this Court, because a detainee who did not make a written request for a speedy trial after six or nine months would be in no position to claim the benefits of the speedy trial decree.

Finally, although the District Court stopped short of dismissing indictments as a means of enforcing the speedy trial right (but *cf. Strunk* v. *United States,* 412 U.S. 434 [1973]), the distinction between dismissing indictments and releasing detainees on their own recognizance is meaningless because each exerts the same pressure on the prosecutor to bring the detainees to trial. Indeed the intention of the District Court to accomplish this purpose was made manifest by its statement that, "The risk to the [respondent Justices] and the public from the release of a dangerous defendant or one who may abscond, can be avoided by providing appropriate procedures and personnel to bring him to trial promptly" (Petition, 32a). Thus petitioners' arguments that the District Court's order was merely an equitable remedy designed to protect the speedy trial right (p. 10), or that it was "conservative" in nature (p. 11), cannot overcome the obvious difficulty that the District Court was forcing the state to bring an entire class of detainees to trial within a fixed period of days and months.

The District Court's order was also properly vacated by the Court of Appeals because it represents an example of the intrusion into state criminal proceedings that was condemned by this Court in *O'Shea* v. *Littleton,* 414 U.S. 488 (1974). In *O'Shea* this Court noted that "[a] federal court should not intervene to establish the basis for future intervention that would be so intrusive and unworkable" as an ongoing federal audit of state criminal proceedings (see 414 U.S. at 500). This Court warned of "unwarranted anticipatory interference in the state criminal process by means of continuous or piecemeal interruptions of the state proceedings by litigation in the federal courts." In the instant case the implementation of the District Court's speedy trial rule would have resulted in an audit by the District Court of all speedy trial claims made by Kings County detainees, since the District Court's order would have superseded the motion procedures of the state court. The District Judge would have been required to determine

whether hundreds of detainees were entitled to be released from custody under the formula contained in the preliminary injunction, since the order contained no provision for review of speedy trial claims by the state judges. This type of daily involvement in state criminal proceedings is precisely what this Court was opposed to in *O'Shea* and in the other leading cases on federal intervention. E.g. *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971).

In sum, the judgment of the District Court was properly vacated by the Court of Appeals because it failed to follow the principles enunciated by this Court in *Barker* v. *Wingo*, *supra*. As the Court of Appeals stated in its decision, speedy trial issues should be decided on a case-by-case basis, and relief should not be granted in wholesale lots. The District Judge fashioned the wrong remedy to deal with a complex problem, and erroneously intervened into the internal procedures of the state court.

CONCLUSION

Petitioners' application for certiorari should be denied in all respects.

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Respectfully submited,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

HILLEL HOFFMAN
Assistant Attorney General
of Counsel